REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NUMBER 40 OF 2018

MICAH MAINA KINUTHIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal against conviction and sentence before Hon. Wakumile on 28th March 2018 in Nakuru Criminal case No. 32 of 2017

JUDGMENT

1. The appellant was charged and convicted for the offence of defilement Contrary to **Section 8(1) of read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.**

The victim of the offence was a young girl of six (6) years old. The offence was alleged to have been committed on the 10th February 2017 in Nakuru North Sub County.

Upon full trial, the trial court made a finding that the prosecution as had proved the case beyond reasonable doubt and sentenced him to serve life imprisonment as provided under the Act on the 28th March 2018.

2. The appellant appealed against both the conviction and sentence upon grounds that:

a. The charge sheet was defective

b. Prosecution evidence was contradictory, inconsistent, and not sufficient to sustain a conviction

c. That penetration was not proved

d. Sentence was excessive.

I have considered the entire prosecution evidence.

3. The duty of the first appellate court is to re-examine the evidence adduced before the trial court and to satisfy itself that the said evidence supports the trial court's findings but warning itself that it never saw or heard the witnesses testify **– Republic –vs- George Anyango Anyang and Denis Oduol Ongojo (2016) e KLR**.

4. It is not the duty of an appellate court to look for evidence that may support the court's findings. The court will however weigh the entire evidence and draw its own conclusions – **Pandya –vs- Republic (1959) EA 336.**

5. **Section 8(1) of the Sexual Offences Act (SOA)** provides that

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

6. The **Children's Act No. 8 of 2001** describes and gives a meaning to **penetration** as the partial or complete insertion of the genital organs of a person in the genital organs of another person.

7. The ingredients of defilement that the prosecution ought to prove to sustain a conviction are

a. Age of the child

b. Proof of penetration

c. Positive identification of the assailant

See **Hilary Nyongesa –vs-Republic** where the court held that for a conviction to be sustained, the above ingredient must be strictly proved.

8. The appellant filed written submissions upon which he relied on fully. I have perused and considered the said submissions.

PW1 was the minor child CW, a class 1 pupil, then at [particulars withheld] Primary School.

The record shows that the trial court took the child through a *voire dire* examination. The court was satisfied of her intelligence and ability to testify. She was affirmed and testified in Kiswahili. Her evidence was plain and straight forward.

9. That the appellant got hold of her and took her to his house and inserted his thing into hers, pointing at her private parts and did "bad manners twice." She continued that the appellant rested after the first session, went and washed his clothes then returned for second round, and that he kept peeping though the window, after which he released her to go home. On cross examination, the minor denied having been coached to implicate the appellant.

10. **PW2** was the minor's grandmother. She produced the minor's birth notification card showing her age as 6 years. Her testimony was that the appellant was a neighbour and that a day after the act, she was informed of the offence and upon interrogating the minor in the presence of her parents, she confirmed having been defiled by the appellant in his house. That this was upon noticing that she was walking with difficulty.

It was **PW2's** further evidence that there existed no grudge between the minor's parents and himself, nor between the families.

11. **PW3** was a minor, JT, 11 years old and a pupil who testified on oath and upon the court having been satisfied of his intelligence.

His evidence was that the appellant's sister told him that the appellant had done "bad manners" to the minor girl upon which he reported to PW2. On cross examination, he denied having been coached.

12. **Medical evidence** was tendered by a chief clinical officer at Bahati Sub County hospital, **PW4** – David Mbugua.

He examined the child on the 14th September 2017, twenty two (22) days after the offence complained of going by the dates stated in the charge sheet, and two days as per the P3 form which states date of offence as the 10th February 2017.

His observations were that the external gentalia, labia were inflamed and the hymen was torn. No discharge of blood was noted.

His remarks were that a swab examination could not yield much as the child had passed urine and stools and had showered. He concluded that the child had been defiled.

13. The investigating officer's evidence was adduced by Cpl Jerusha. It is a repeat narration of what PW2 and PW3 told her.

14. Upon closure of the prosecution evidence, the appellant gave an unsworn defence upon **Section 211(Criminal Procedure Code)** having been complied with.

He denied having committed the offence and testified that the whole day of the alleged offence, he was doing his casual work upto the evening. He testified that he surrendered to the police station when he was informed the police officers were looking for him.

15. That is the evidence upon which the trial magistrate entered a verdict of guilt and proceeded to sentence the appellant to suffer life imprisonment.

16. **Analysis of evidence and Findings**

The charge sheet as I have stated above states the date of the alleged offence as 10th January 2017. The name of the victim CWG is cancelled, and not initialed. No other name is stated. This is so on count 1 and 2.

17. In the trial magistrate's judgment, the main offence of defilement and the alternative charge of indecent act with a child are repeated. The date of the alleged offence is also stated as the 10th January 2017.

PW1 the minor child told the trial court that she could not remember the date she was defiled but **PW3** and **PW4** stated the date of offence as **11th February 2017,** while the clinical officer (**PW4**) stated the date of offence as **10th February 2017**, while it is indicated as **10th January 2017** in the charge sheet.

18. In his submissions, the appellant submitted that he was convicted on a defective charge sheet whose particulars were not clear or adequate, in that the dates were in variance with the evidence, the victim's names were cancelled, and no explanation offered and thus it stands defective.

Section 134 of the Criminal Procedure Code states

> *Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information to the nature of the offence charged.*

19. In the case **Jason Yongo –vs- Republic (1983) e KLR**, **JJA Porter and Chesoni** rendered that a charge sheet is defective if

> *a. It does not accord with the evidence in criminal proceedings because of inaccuracies or deficiencies in the charge.*
>
> *b. If it gives a misconception of the alleged offences in its particulars or*
>
> *c. Mistaken descriptions in the particulars, the original charge is therefore defective within the meaning of Section 214 of the Criminal Procedure Code.*

20. **Section 214 Criminal Procedure Code** discusses the matter of variance between charges and evidence, and amendment of charge.

The prosecution is allowed to amend the charge sheet. It did not seek to amend the charge sheet.

Subsection (2) states that variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended if it is proved that the proceedings were infact instituted within the time limited by law (if any).

21. **Under Sub-Section (3),** when there is a variation between the charge and the evidence, the court shall if it is of the opinion that the accused has been thereby misled or deceived, the court may either convict or pass sentence upon or make an order of acquittal.

22. By the above commission and omission, would the court be satisfied that the charge sheet, with the victim's names cancelled, and dates on the alleged date of the offence being at variance with the evidence adduced, be said to have been accorded a fair hearing and sufficient opportunity to understand the charges facing him?

PW1, the minor victim did not know the date of the alleged offence, nor the time. Nobody, or any witness was called to certify that indeed the PW1 was the victim. Indeed nobody saw the victim being defiled.

23. **PW2** discovered that her granddaughter was walking with difficulty after two days. The parents of the child did not notice anything. They did not testify.

PW3 spoke of the appellant's sister, one Chiro who is alleged to have told him that the appellant defiled the alleged child. This very vital witness was not called to testify.

24. I find it quite unusual that the trial court did not notice or if it did, did nothing about the obvious variance in the charge sheet and the evidence, and repeated the same in her evidence, and more particularly the failure to note that the charge sheet did not have a clear name of the alleged victim.

It is not rocket science that without an identifiable complainant of a sexual offence, there can be no offence nor a conviction.

25. In my very considered opinion, this omission is so grave that it goes to the core and root of the criminal charge.

The above scenario offends the provision of **Section 134 of Criminal Procedure Code** as necessary particulars *viz,* the victim of the alleged offence and time and date the offence is alleged to have been committed.

Being aware that variance in time of commission of an offence may be not so material as to vitiate an otherwise lawful finding, when the above variations are put together they no doubt are material.

The above material variations creates doubts in my mind as to whether the alleged offence was committed on the material dates as stated in the charge sheet to an unnamed victim.

26. The standard of proof in a criminal trial is beyond reasonable doubt. That burden of proof always rests with the prosecution and never should an accused person be called upon to prove his innocence. It is trite that circumstantial evidence, which is the case in this appeal must be so strong and complete that any inference of guilt drawn must be cogently and firmly established.

27. In the case **Abanga** alias **Onyango –vs- Republic (UR) Criminal Appeal No.32 of 1990**, the court rendered that the totality of the circumstances should form a chain so complete that there would be no escape from the conclusion that with all human probability the crime was committed by the appellant and no one else.

See also **Simon Ekaredi Omoto –vs- Republic (2019) e KLR** and **Gabriel Gatonye Gakunya –vs- Republic (2019) e KLR.**

28. Having carefully re-examined the evidence, I am not persuaded that the prosecution proved its case to the required standard**.** Suffice to

render that once the court finds that the charge sheet or information is defective, and the evidence adduced by the prosecution is at variance, and cannot be salvaged under Section 124 Criminal Procedure Code, then the entire trial and proceedings come to naught.

In the circumstances I need not belabour in interrogating the rest of the grounds of appeal.

29. The upshot is that I allow the appeal, quash the conviction and the sentence, and set the appellant at liberty unless otherwise lawfully held.

Orders accordingly.

Delivered, Dated and Signed at Nakuru this 14th Day of November 2019.

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J.N. MULWA

JUDGE